LETTER OPINION
98-L-17

March 2, 1998

Ms. Carol Olson
Executive Director
North Dakota Department of Human Services
State Capitol
Bismarck, ND 58505-0250

Dear Ms. Olson:

Thank you for your letter asking whether certain information provided to the Department of Human Services (DHS) as an attachment to a contract with a contractor is confidential under N.D.C.C. § 44-04-18.4.

The information referred to in your letter are the capitation rates paid to a contractor for medical coverage under the Medicaid program, broken down by aid category, gender, and age. A subsequent memorandum from the Department to a member of my staff indicates that the rates were obtained by the contractor from an actuary (at an expense of roughly $75,000) based, in part, on encounter and experience data provided by the Department. The capitation rates include the contractor's administration rates. The total amount paid to the contractor is determined by multiplying the rate in each aid category by the number of recipients in that category.

Because DHS is a state agency, its records are open to the public unless otherwise specifically provided by law. N.D.C.C. § 44-04-18. N.D.C.C. § 44-04-18.4 makes certain information confidential and provides in part:

1. Trade secret, proprietary, commercial, and financial information is confidential if it is of a privileged nature and it has not been previously publicly disclosed.

2. "Trade secret" includes:

   a. A computer software program and components of a computer software program which are subject to a

copyright or a patent, and any formula, pattern, compilation, program, device, method, technique, or process supplied to any state agency, institution, department, or board which is the subject of efforts by the supplying person or organization to maintain its secrecy and that may derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons or organizations that might obtain economic value from its disclosure or use; and

b. A discovery or innovation which is subject to a patent or a copyright, and any formula, pattern, compilation, program, device, method, technique, or process supplied to or prepared by any public entity which is the subject of efforts by the supplying or preparing entity, person, business, or industry to maintain its secrecy and that may derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, any person who might obtain economic value from its disclosure or use.

As indicated in this section, for trade secret or commercial or financial information to be protected, it must be of a privileged nature and not previously publicly disclosed.

As a compilation, the capitation rates qualify as a confidential trade secret if "of a privileged nature" and not previously publicly disclosed, if the contractor attempts to maintain the secrecy of the information and if the rates have independent economic value if not generally known by other persons or organizations. In this case, the issue is whether the capitation rates are "of a privileged nature."

Because what constitutes "commercial" or "financial" information is not defined in the statute, the terms are to be given their plain and ordinary meaning. N.D.C.C. § 1-02-02; 1994 N.D. Op. Att'y Gen. L-1 (January 3 letter to Isakson). Both the plain meaning of the terms and the interpretation of the terms in similar federal cases indicate that "commercial" and "financial" information refer broadly to information pertaining to commerce (buying or selling of goods or services) or finances (monetary resources). The American Heritage Dictionary 297, 504 (2d coll. ed. 1991); Public Citizen Health

Resource Group v. F.D.A., 704 F.2d 1280, 1290 (D.C. Cir. 1983); American Airlines, Inc. v. National Mediation Bd., 588 F.2d 863, 870 (2d Cir. 1978). Thus, it appears the capitation rates may also be considered commercial or financial information.

This office looks to judicial interpretations of exemption 4 of the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4), in determining whether trade secret or commercial or financial information is "of a privileged nature" and therefore confidential. 1994 N.D. Op. Att'y Gen. L-194 (August 1 letter to Dykshoorn).

> Exemption 4 of FOIA provides that an agency need not disclose information that is "trade secrets and commercial or financial information obtained from a person and privileged or confidential." . . . The test for whether information is "confidential" depends in part on whether the information was voluntarily or involuntarily disclosed to the government. If the information was voluntarily disclosed to the government, it will be considered confidential "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc), cert. denied, 507 U.S. 984 (1993). If the information was obtained under compulsion, it will be considered confidential only "if disclosure . . . is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

Bartholdi Cable Co., Inc. v. F.C.C., 114 F.3d 274, 281 (D.C. Cir. 1997).

Federal case law provides some guidance on whether information has been provided voluntarily under Critical Mass. It has been suggested that because all contractors are "volunteers" in a manner of speaking, unit price information is voluntarily submitted and therefore is confidential if the contractor customarily did not release the information. McDonnell Douglas Corp. v. N.A.S.A., 895 F. Supp. 319 (D.D.C. 1995), vacated as moot, 88 F.3d 1278 (D.C. Cir. 1996). This argument has been rejected as "temptingly simple" and a "rather simplistic approach," because it "would result in classifying all government contractors as per se volunteers whose pricing

information could easily be withheld from the public domain." Id. at 325. Instead, the proper analysis is on the information provided; once a contractor has chosen to do business with the government, was the information required or provided voluntarily? Id. One court has ruled that as a matter of law, the price elements necessary to win a government contract are not voluntary. McDonnell Douglas Corp. v. N.A.S.A., 895 F. Supp. 316, 317-18 (D.D.C. 1995). Compare Cortez III Serv. Corp. v. N.A.S.A., 921 F. Supp. 8, 12 (D.D.C. 1996) (additional, non-mandatory contract information held voluntarily provided).

Although federal cases interpreting FOIA are helpful in interpreting the exception to the open records law in N.D.C.C. § 44-04-18.4 for trade secrets or commercial or financial information, those cases are not conclusive. Courts in two other states have held that the less restrictive standard in Critical Mass for information voluntarily submitted to the government, which is fairly subjective, is inconsistent with the broad open records laws in those states. International Broth. of Elec. Workers v. Denver Metropolitan Major League Baseball Stadium District, 880 P.2d 160, 167 (Colo. Ct. App. 1994); Sublette County Rural Health Care District v. Miley, 942 P.2d 1101 (Wyo. 1997). In each case, the court concluded that trade secret, commercial or financial information submitted voluntarily must nevertheless be disclosed to the public unless the information would be protected as a required submission under FOIA. Id. It is my opinion that the approach taken in these two state cases, rejecting the less restrictive standard for voluntary submissions in Critical Mass, is most consistent with the broad right of access guaranteed by the North Dakota open records law. Therefore, it is my opinion that the capitation rates in this case will be confidential only if they meet the two prong test under National Parks.

Applying the test under National Parks in this requires consideration of whether disclosure is likely to impair DHS's ability to obtain necessary information in the future or whether disclosure would cause substantial harm to the competitive position of the contractor. National Parks, 498 F.2d at 770. Whether DHS's future ability to obtain necessary information would be impaired by disclosing the capitation rates is a question of fact. The agency in possession of the trade secret, commercial or financial information "is in the best position to determine the effect of disclosure on its ability to obtain necessary technical information." AT&T Info. Systems v. G.S.A., 627 F. Supp. 1396, 1401 (D.D.C. 1986) (quotation omitted), rev'd on other grounds and remanded, 810 F.2d 1233 (D.C. Cir. 1987). However, at least one court in the context of government contracts has held that "[i]t is unlikely that companies will stop competing

for Government contracts if the prices contracted for are disclosed." Racal-Milago Gov't Sys. v. S.B.A., 559 F. Supp. 4, 6 (D.D.C. 1981). Compare Orion Research, Inc. v. E.P.A., 615 F.2d 551, 554 (1st Cir. 1980) (finding disclosure of technical proposals submitted in connection with government contracts would impair government's ability to obtain proposals for bidders in the future), cert. denied 449 U.S. 883 (1980). In my opinion, it appears unlikely in this situation that this or other contractors will be less inclined to submit a bid or proposal for future Medicaid contracts if the capitation rates are disclosed.

Consultation with the submitter regarding the potential harm to the competitive position of the contractor that would result from disclosure is appropriate, but DHS must make the decision for itself whether the information is protected. See 1994 N.D. Op. Att'y Gen. at L-198; Lee v. F.D.I.C., 923 F. Supp. 451, 455 (S.D.N.Y. 1996). Actual harm is not required as long as there is evidence of actual competition involving the submitter and a likelihood of substantial competitive injury. GC Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109 (9th Cir. 1994); CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1152 (D.C. Cir. 1987), cert. denied 485 U.S. 977 (1988).

Public disclosure of contract prices is generally considered a part of doing business with the government. See, e.g., AT&T Info. Systems, 627 F. Supp. at 1403 ("strong public interest in release of component and aggregate prices in Government contract awards"). The Court of Appeals for the Ninth Circuit has rejected a contractor's contention that disclosure of a contract price would allow competitors to determine its profit margin by breaking down the total price into component parts with known values, concluding that the components of the total price were subject to fluctuation. Pacific Architects and Eng'rs v. U.S. Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1990). A district court decision protecting contract prices based on the similar argument that disclosure would allow competitors to "undercut future bids" was reversed by the Ninth Circuit because the data was "made up of too many fluctuating variables for competitors to gain any advantage from the disclosure." GC Micro Corp., 33 F.3d at 1115. The Fourth Circuit also has held that unit prices are not confidential. Acumenics Research and Technology v. U.S. Dep't of Justice, 843 F.2d 800 (4th Cir. 1988). But see Gulf and Western Industries, Inc. v. U.S., 615 F.2d 527, 530 (D.C. Cir. 1979).

In the very similar situation of managed care prices in an attachment to a contract between a health maintenance organization and a public hospital, a state appellate court in North Carolina recently rejected

the contractor's competitive injury argument and held that the managed care prices were not protected from disclosure, agreeing with the federal court's observation in Racal-Milago that disclosure of contract prices is part of doing business with the government. Wilmington Star News v. New Hanover Reg'l Med. Ctr., Inc., 480 S.E.2d 53 (N.C. Ct. App. 1997).

One of the main purposes of the North Dakota open records law is to give the public the ability to see how public funds are being spent. Grand Forks Herald, Inc. v. Lyons, 101 N.W.2d 543, 546 (N.D. 1960). Exceptions to the open records law are therefore narrowly construed. See Hovet v. Hebron Public School Dist., 419 N.W.2d 189, 191 (N.D. 1988). Based on the broad purpose of N.D.C.C. § 44-04-18, a narrow construction of the exception in N.D.C.C. § 44-04-18.4 for trade secret and commercial or financial information, and the case law from other jurisdictions, it is my opinion that disclosure of contract prices is a cost of doing business with the state or a political subdivision and, as a matter of law, does not cause substantial harm to the competitive position of the contractor.

In summary, it is my opinion that the capitation rates used as a formula for determining the total contract price are confidential under N.D.C.C. § 44-04-18.4 only if disclosure will impair DHS's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the contractor providing the information. Although whether DHS's ability to obtain necessary information in the future would likely be impaired by disclosure of the capitation rates is a question of fact, it is unlikely that disclosure would cause the contractor to be less inclined to submit a bid or proposal for future Medicaid contracts. Furthermore, it is my opinion that, based on the broad public policy underlying the North Dakota open records law and relevant federal and state case law, the disclosure of government contract prices, including unit prices, will not substantially harm the competitive position of the contractor. Therefore, it does not appear that the capitation rates are confidential under N.D.C.C. § 44-04-18.4.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

jcf/vkk